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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT,
ARKANSAS STATE PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION

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INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT OF POINTS TO BE ARGUED	3
ARGUMENT	
A. INTRODUCTION	4
B. THE LOWER COURTS WERE CORRECT IN HOLDING THAT THE STATISTICAL DATA SUBMITTED BY PETITIONER WAS INSUFFICIENT TO SHOW RACIAL DISCRIMINATION IN THE IMPOSITION OF THE DEATH SENTENCE IN PETITIONER'S CASE	4
1. The Statistical Argument	4
2. The **Prima Facie** Case Argument	7
C. and D. THE SINGLE VERDICT SYSTEM USED IN ARKANSAS IS NOT UNCONSTITUTIONAL AND THERE WAS NO RACIAL DISCRIMINATION IN THE SELECTION OF THE JURY	8
CONCLUSION	10

Table of Authorities

Cases:

Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark., 1966)	2, 5, 9
Maxwell v. Bishop, 398 F. 2d 138 (8 Cir., 1968)	2, 5, 9
Maxwell v. Bishop, 385 U.S. 650 (1967)	2
Maxwell v. State, 233 Ark. 700, 370 S.W. 2d 113 (1963)	2
Maxwell v. Stephens, 229 F. Supp. 205 (E.D. Ark., 1964)	2, 8
Maxwell v. Stephens, 348 F. 2d 325 (8 Cir., 1965)	2, 7
Mitchell v. Stephens, 353 F. 2d 129, 133 (8 Cir., 1965)	8
Wright v. Rockefeller, 376 U.S. 52 (1964)	8

Statutes:

Ark. Stat. Ann. (1947) §43-2153	1

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, William L. Maxwell, was convicted in Hot Springs, Garland County, Arkansas, of the brutal and sordid rape of Miss Sylvia Spoon. Because the jury failed to recommend a llife sentence, petitioner was subsequently sentenced to death. Ark. Stat. Ann. §43-2153 (1947). While this Court is not concerned with the issue of the guilt or innocence of petitioner, respondent respectfully invites the Court's attention to the ugly facts surrounding this case as reported at pages 114 through 116 of 370 S.W. 2d.

On appeal from his conviction, a unanimous State Supreme Court affirmed the trial court. *Maxwell* v. *State,* 233 Ark. 700, 370 S.W. 2d 113 (1963). A petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, and the case fell to The Honorable Gordon E. Young. On May 6, 1964, Judge Young denied and dismissed the petition. *Maxwell* v. *Stephens,* 229 F. Supp. 205 (E.D. Ark. 1964). On appeal from the denial of the petition, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court, one judge dissenting. *Maxwell* v. *Stephens,* 348 F. 2d 325 (8 Cir., 1965). Certiorari was denied by this Court at 382 U.S. 944 (1965).

Alleging that new evidence had become available, a second petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division. The case was lodged on the docket of The Honorable J. Smith Henley. Following an exhaustive hearing, the petition was denied. *Maxwell* v. *Bishop,* 257 F. Supp. 710 (E.D. Ark., 1966). Judge Henley further denied a certificate of probable cause for appeal to the United States Court of Appeals for the Eighth Circuit. A certificate or probable cause was also denied by United State Circuit Judge M. C. Matthes. On writ of certiorari to this Court, the denial of the certificate of probable cause was reversed and the case remanded to the Eighth Circuit Court of Appeals with directions to issue a certificate of probable cause and to hear the appeal in the normal appellate process. *Maxwell* v. *Bishop,* 385 U.S. 650 (1967).

On appeal, the lower court was again affirmed. *Maxwell* v. *Bishop,* 398 F. 2d 138 (8 Cir., 1968).

STATEMENT OF POINTS TO BE ARGUED

A. *Introduction.*

B. *The lower courts were correct in holding that the statistical data submitted by petitioner was insufficient to show racial discrimination in the imposition of the death sentence in petitioner's case.*

1.

Maxwell v. *Bishop*, 257 F. Supp. 710 (E.D. Ark., 1966)

Maxwell v. *Bishop*, 398 F. 2d 138 (8 Cir., 1968)

2.

Maxwell v. *Bishop*, 398 F. 2d 138 (8 Cir. 1968)
Wright v. *Rockefeller*, 376 U.S. 52 (1964)

C. and D. *The single verdict system used in Arkansas is not unconstitutional and there was no racial discrimination in the selection of the jury.*

Maxwell v. *Bishop*, 257 F. Supp. 710 (E.D. Ark., 1966)

Maxwell v. *Bishop*, 398 F. 2d 138 (8 Cir. 1968)

ARGUMENT

A. *Introduction*

The issues which this case now brings before the Court have been as thoroughly scrutinized by the state and federal judiciary as one case can be. The Arkansas Supreme Court, two federal district judges, two panels of the Eighth Circuit Court of Appeals, and this Court, on an earlier petition for a writ of certiorari, have all found the petitioner's allegations to be without merit.

The new evidence, which petitioner successfully alleged was a basis for filing his second petition for a writ of habeas corpus and which he now relies on in again seeking a writ of certiorari from this Court, is not in a technical sense new evidence at all. After finding that the statistics submitted to Judge Young and to the Eighth Circuit Court of Appeals and to this Court were unconvincing and legally insufficient, a more detailed study was begun at the instance of the N.A.A.C.P. Legal Defense and Educational Fund by Professor Marvin Wolfgang. The statistics which came about as the result of this later study, constitute the "new evidence" now relied on by petitioner.

B. *The lower courts were correct in holding that the statistical data submitted by petitioner was insufficient to show racial discrimination in the imposition of the death sentence in petitioner's case.*

1.

Both Judge Henley and the Eighth Circuit Court of Appeals have thoroughly discussed the statistical data

submitted by petitioner, both as to what it proves and does not prove. Respondent knows of little he can add to what those learned courts have stated with regard to the data submitted.

There are, however, certain practical aspects of this case which respondent would respectfully stress to the Court.

Respondent would first bring to the Court's attention the following statement by Judge Henley (*Maxwell* v. *Bishop*, 257 F. Supp. at p. 720):

> "In his opinion Judge Young aptly stated that the issue of consent is always involved in rape cases. In cases not involving inter-racial situations the issue of consent may be and frequently is very real; that issue from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men. And the disproportion between death sentences imposed on Negro men convicted in inter-racial cases and such sentences imposed in other cases may well be referable in large measure to the fact that in the former cases the trial jurors may have a firmer and more abiding conviction of the truth of the charges than in cases of the latter type."

When this consideration is viewed in the light of the other facts of this case, that petitioner never denied his guilt, the horrible circumstances surrounding the crime, and the strength of the prosecution's case, it does not take one trained in the school of psychology to imagine the abiding conviction of the defendant's guilt which this jury must have possessed.

Respondent would further point out to the Court the following excerpt from Judge Blackmun's opinion for the Court of Appeals (*Maxwell* v. *Bishop*, 398 F. 2d at p. 148):

"At oral argument we asked Professor Amsterdam, counsel for Maxwell, whether (apart from any Eighth Amendment argument) his statistical approach would not mean that it would be constitutionally impossible for a negro defendant in Arkansas ever to receive the death penalty upon conviction of the crime of rape of a white woman. The answer given us was in the affirmative, that is, that it would be constitutionally impossible. At the same time it was conceded, in contrast, that it would be possible for a white man to receive the death penalty upon his conviction for rape. When counsel was asked whether this would not be discriminatory, the reply was that once the negro situation was remedied the white situation 'would take care of itself'.

"The legal logic and the rightness of this totally escape us. If that end result would actually be forthcoming (and we wonder whether this may accurately be forecast), that fact does not, in our view, make it legally right or satisfy constitutional dictates. We still read the first section of the Fourteenth Amendment as proscribing the denial 'to any person' within a state's jurisdiction of 'the equal protection of the laws'. We feel that this means what it seems to require, namely, protection which is equal, and that equal protection is denied if, factually, a member of one race (whether black or white) is subjected, because of his race, to greater or different punishment than a member of another race. The argument therefore turns back upon and defeats the very side which here proposes it. We are not inclined to accept as constitutional doctrine and abstraction which provides equality only through assumed and hoped-for day-to-day practicalities. It is the law, not probabilities or possibilities, which must afford equal protection."

Finally respondent would make this observation to the Court: Even if we assume that the study submitted

on behalf of the petitioner raises a presumption of past instances of discrimination, in no way does this taint petitioner's trial and conviction. Petitioner was convicted in Garland County, a predominantly white area of the state, which was not one of the counties covered in the study, and he is the first negro to receive a death sentence for the crime of rape in that county. When, again, we take into account other variables, which Professor Wolfgang's study did not, such as the strength of the prosecution's case, which the record reflects was very strong here, the brutality involved, which clearly was present in the perpetration of this crime, and the lack of any defense in the petitioner's behalf, any allegation of discrimination on *this* jury's part is pure speculation.

2.

Counsel for petitioner earnestly contends that petitioner has made a *prima facie* showing of discrimination in the imposition of death sentences in rape cases, and that since this was not rebutted by the state, petitioner is entitled as a matter of law to prevail. With this contention respondent totally disagrees.

In attacking the decisions of the federal District Court and the Court of Appeals, petitioner fails to recognize that the built-in and obvious fallacies of Professor Wolfgang's study prevent a decision that a *prima facie* case has been made. Judge Blackmun well stated these fallacies in his opinion at page 146 of 398 F. 2d:

> "It is perhaps well to emphasize initially what the study and Dr. Wolfgang's testimony do not do or purport to do:
>
> "1. They do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted. They are concerned with 19 other Arkansas counties and with counties in 11 other states.

"2. They admittedly do not take every variable into account.

"3. They do not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination.

"4. They do not deny that generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it. *Maxwell* v. *Stephens*, *supra*, p. 330 of 348 F. 2d, and cases cited; *Mitchell* v. *Stephens*, 353 F. 2d 129, 133 (8 Cir. 1965), cert. denied 384 U.S. 1019.

"What we are concerned with here is Maxwell's case and only Maxwell's case."

Despite these shortcomings, petitioner would have this Court hold that the study is a *prima facie* case merely because it was uncontradicted. Clearly, the fact that no contradictory proof was offered does not mean that Professor Wolfgang's study was or is undisputed. Respondent admitted the correctness of the "facts" but not the inferences to be drawn from those facts. And because of the fallacies of the study, respondent submits that the inference is equally strong that no discrimination was practiced in giving petitioner a death sentence. *Wright* v. *Rockefeller*, 376 U.S. 52, rehearing denied 376 U.S. 959 (1964).

C. and D. *The single verdict system used in Arkansas is not unconstitutional and there was no racial discrimination in the selection of the jury.*

Each of these points has been thoroughly and exhaustively considered and decided by Judge Henley and

by the Court of Appeals. Respondent is unable to cite to the Court any further authority than that set forth in the two lower court decisions. Therefore, respondent respectfully cites the Court to those decisions. *Maxwell* v. *Bishop*, 257 F. Supp. 710; *Maxwell* v. *Bishop*, 398 F. 2d 138.

CONCLUSION

On the basis of the foregoing argument and of the record in this case, respondent respectfully submits that certiorari should not be granted.

Respectfully submitted,

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